

# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM** [REDACTED] **1923**

**No.** [REDACTED] **.79**

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**WALDEMAR GNERICH AND JEREMIAH T. REGAN, CO-  
PARTNERS, DOING BUSINESS UNDER THE FIRM NAME  
AND STYLE OF B. & S. DRUG COMPANY, APPELLANTS,**

**vs.**

**S. F. RUTTER, AS PROHIBITION DIRECTOR IN AND FOR  
THE DISTRICT OF CALIFORNIA.**

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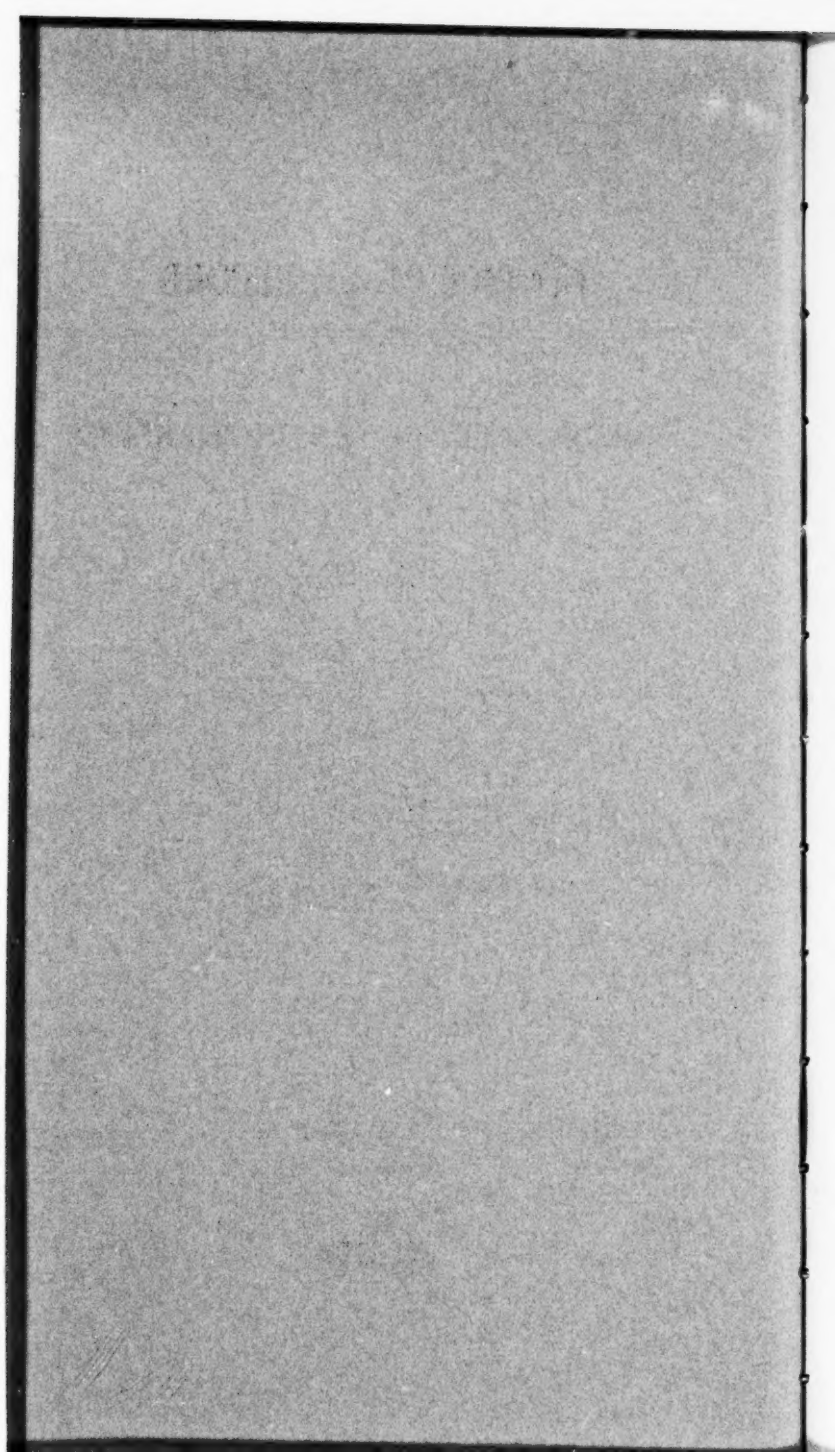
**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

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**FILED JULY 14, 1922.**

**(29,033)**



(29,033)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 483.

WALDEMAR GNERICH AND JEREMIAH T. REGAN, CO-  
PARTNERS, DOING BUSINESS UNDER THE FIRM NAME  
AND STYLE OF B. & S. DRUG COMPANY, APPELLANTS,

*vs.*

S. F. RUTTER, AS PROHIBITION DIRECTOR IN AND FOR  
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In the District Court of the United States, in  
and for the Southern Division of the Northern  
District of California, Second Division.

IN EQUITY.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Di-  
rector in and for the District of California,  
Defendant.

To Restrain Prohibition Director of the District of  
California from Restricting or Limiting the  
Amount of "Intoxicating Liquor" that may be  
Purchased and Used and Dispensed by Com-  
plainants as Pharmacists Under National Pro-  
hibition Act and Regulations Issued There-  
under.

**Amended Bill of Complaint.**

Plaintiffs bring this suit on behalf of themselves  
and at the request of Retail Druggists Association  
of San Francisco and Alameda County Pharmaceu-  
tical Association, voluntary unincorporated associa-  
tions, on behalf of the members thereof and of all  
other druggists and pharmacists similarly situated  
and affected by the acts of defendant hereinafter  
set forth, and by leave of Court file this, their

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amended bill of complaint, and for cause of action against defendant allege:

### I.

Plaintiffs are both citizens of the United States of America and residents of the Southern Division of the Northern District of California, and are co-partners conducting a general drug or pharmaceutical business together at Number 27 Stockton Street in the city and county of San Francisco. Complainants are both pharmacists by profession, duly licensed as such under the laws of the State of California, and are engaged in the practice of pharmacy and of compounding medicinal preparations on physicians' prescriptions and in dispensing at retail various medicinal preparations at their aforesaid place of business. [1\*]

### II.

In the compounding of medicinal preparations or physicians' prescriptions and in manufacturing and compounding various preparations listed in the United States Pharmacopeia and the National Formulary, and of other preparations not so listed for sale in the ordinary course of complainants' business, large quantities of alcohol and other "intoxicating liquors," as that term is defined in Section 1 of Title II of the "National Prohibition Act," is now, and for a period of more than ten (10) years has been lawfully used by complainants. That the pharmacists profession and the correct and accurate compounding of medicinal preparations as hereinabove set forth, from time im-

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\*Page-number appearing at foot of page of original certified Transcript of Record.

memorial have been and they are now necessary and essential adjuncts to the medical profession and of the healing art. The number and amount of physicians' prescriptions presented to complainants to be compounded, and the amount of medicinal compounds, including "intoxicating liquors," purchased from complainants by the general public varies from time to time, depending upon the season of the year and upon the prevalence or absence of various diseases and epidemics in the community. Complainants are entitled to compound and fill and they do compound and fill all lawful physicians' prescriptions presented to them by the general public, and do bottle and sell to the public such other compounds and medicinal preparations hereinabove referred to as the demands of their business require, under such laws, rules and regulations of the United States and of the State of California as are, or as may from time to time be enacted and prescribed; complainants have at all times fully and fairly complied with all lawful acts, rules, regulations and ordinances, Federal, State and municipal, as appertain or relate to their said business and their profession [2] as pharmacists.

### III.

That respondent is the duly appointed, qualified and acting "Prohibition Director" for the District of California, acting as such under the "Prohibition Commissioner" and the Commissioner of Internal Revenue of the Treasury Department of the United States; that respondent's powers and duties as such officer are such only as are prescribed by the

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"National Prohibition Act" and such lawful rules and regulations as may be published by the Commissioner of Internal Revenue with the approval of the Treasury Department of the United States Government.

IV.

That heretofore and under date of January 16, 1920, the said Federal Prohibition Commissioner and the said Commissioner of Internal Revenue with the approval of the Secretary of the Treasury did publish "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of Intoxicating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States," which said rules and regulations have been and they now are in full force and effect. That it is the duty of said respondent, under said regulations, to enforce the said National Prohibition Act and the various provisions thereof within the District of the State of California.

V.

That heretofore and on the 29th day of September, 1920, in conformity with law and said regulations, complainants duly applied for and were granted by the Federal Prohibition [3] Commissioner at Washington, D. C., on the form prescribed by said regulations, a permit "to use and sell Intoxicating Liquors for other than beverage purposes," in the following particulars, to wit:

1. In the manufacture of United States Pharmacopeia and National Formulary preparations unfit for use as a beverage.

2. In selling in quantities not exceeding one pint, to persons not holding permits to purchase when medicated according to any one of the seven formulae set forth in section 61 of the aforesaid regulations prescribed by said Treasury Department.

3. In compounding medicinal preparations on physicians' prescriptions or otherwise medicated according to the standard set forth in paragraph "A" Section 60 of the aforesaid regulations, prescribed by said Treasury Department, and put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

4. In selling retail as such, to others holding permits which confer authority to purchase and use intoxicating liquors for nonbeverage purposes.

5. In dispensing as such on physicians' prescriptions given on Form 1403 prescribed by the Treasury Department of the United States Internal Revenue, in quantities not exceeding one pint in ten days to the same person, and for nonbeverage purposes.

## VI.

That complainants were required by said regulations to set forth, and they did set forth in their application for said permit, that the kind and the probable maximum quantity of "intoxicating liquors" that they desired to sell or use in their said business during any quarterly period, would be

two hundred [4] and eighty-three proof gallons of alcohol, one hundred and fifty-seven proof gallons of whiskey, and five gallons of wine and four and one-half proof gallons of brandy; that said application was duly verified by your petitioners and was accompanied by a bond in the form and amount required by said regulations to cover the maximum quantities of intoxicating liquors set forth in said application as desired to be used or sold by them, a copy of which said application is hereto annexed, marked Exhibit "A" and made a part hereof.

#### VII.

That under date of November 26, 1920, said Prohibition Commissioner issued to your petitioners herein a permit under the National Prohibition Act and regulations issued thereunder, authorizing and permitting your petitioners to use and sell intoxicating liquors for other than beverage purposes, in conformity with said application, but arbitrarily and without authority of law or regulation, inserted in said permit the restriction that "this permit is issued for one hundred gallons of distilled spirits and five gallons of wine" for each quarterly period, a copy of which said permit is likewise annexed hereto and made a part hereof and marked Exhibit "B."

#### VIII.

That said permit has never been set aside or revoked and the same is still in full force and effect.

#### IX.

Under the authority of the aforesaid permit so

granted to complainants, under date of February 17, 1921, your petitioners made application to the defendant as said Federal Prohibition Director on the form and in the manner prescribed by the aforesaid Regulations of the Treasury Department, for a [5] permit to purchase one barrel of grain alcohol for the uses and purposes set forth in the permit heretofore issued to complainants hereinabove referred to; that on the 2d day of March, 1921, said application for permit to purchase was returned to complainants by said Federal Prohibition Director, disapproved, for the reason that the purchase of said barrel of alcohol by complainants would allow complainants to withdraw in excess of one hundred gallons of "distilled spirits" per quarter, as more fully appears from a letter from respondent to complainants dated March 2d, 1921, a copy of which letter is hereto attached, made a part hereof and marked Exhibit "C"; that numerous other applications for permits to purchase alcohol and "intoxicating liquors" have been made by your complainants to said respondent and have been likewise disapproved on the ground that your complainants have exceeded the amount of "distilled spirits" permitted by them to be dispensed under the aforesaid permit issued to them under the National Prohibition Act.

### X.

That because of said action of said respondent complainants have been greatly injured in their said business of pharmacists and have been prevented, and are now being prevented, from lawfully

pursuing their business of manufacturing and compounding the aforesaid preparations and in using, dispensing and selling the aforesaid alcohol and "intoxicating liquors" for other than beverage purposes; that said injury to complainants' business will continue to their great and irreparable damage unless said respondent, in approving the applications of your complainants for permits to purchase said alcohol and "intoxicating liquor," be restrained and enjoined by this Honorable Court from limiting the amount to be purchased and used by complainants [6] to quantities not exceeding one hundred gallons of distilled spirits per quarterly period.

## XI.

That the restriction so fixed in said permit by said Commissioner is arbitrary, unlawful, unreasonable and void, as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the government of the United States, and as an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of "Intoxicating Liquor" for medicinal and nonbeverage purposes; and as a violation of the rights, privileges and duties conferred upon complainants as pharmacists under the provisions of said act. That said restriction is not necessary to the enforcement of any of the provisions of the National Prohibition Act, nor is it authorized by said act or by any rule or regulation published by the authority thereof, and is an un-



necessary, useless, arbitrary, harmful and unlawful restraint and burden placed upon the profession and the business of complainants and others similarly situated.

## XII.

Before the filing of this bill of complaint, plaintiffs duly requested said Prohibition Director to disregard and ignore the aforesaid restriction purporting to be contained in said permit, but said official refused and threatens to continue in his attempts to enforce said restriction; that complainants have no remedy at law and bring this bill in equity to restrain defendant's threatened continued interference with plaintiffs in their business as pharmacists and druggists, and to compel him to ignore and disregard said purported limitation, in issuing to [7] plaintiffs permits to purchase "intoxicating liquor" under their aforesaid permit to use and sell "intoxicating liquor" for nonbeverage purposes.

## XIII.

That because of the said arbitrary, unreasonable and unlawful and void action and restriction of said Commissioner in limiting the amount of alcohol and intoxicating liquors that can be purchased and dispensed by complainants, they have been prevented from filling many prescriptions lawfully and regularly issued by licensed physicians resident of the Southern Division of the Northern District of California, and issued by said physicians under permits on the form and in the manner required by law; furthermore, complainants have been pre-

vented from purchasing alcohol and spirituous liquors in such quantity or quantities as to them would be advantageous, and have been compelled to purchase said alcohol and said spirituous liquors in small quantities, and have been forced thereby to pay exorbitant prices therefor, all to their future great and irreparable injury.

#### XIV.

This suit is one arising under the laws of the United States and where no plain, adequate and complete remedy may be had by plaintiffs at law, and is brought by them to avoid a multiplicity of judicial proceedings.

WHEREFORE, complainants pray that a day be fixed by this Honorable Court for the hearing of this complaint; that a writ of subpoena issue out of and under the seal of this Honorable Court directing and requiring respondent to appear herein; that said respondent be cited to be and appear before this Honorable [8] Court at a time and place to be fixed by order of this Court and then and there show cause, if any he may have, why said purported limit so fixed in plaintiffs' permit should not be by him disregarded pending the final hearing and determination of this cause, and why all lawful applications filed by complainants and others similarly situated, to purchase alcohol and spirituous liquors in such quantity or quantities as to them may be most advantageous to their businesses as pharmacists, should not be approved; that at said hearing such other proper orders or decrees be made as may to this Honorable Court seem meet

and proper in the premises; that upon the final hearing hereof a judgment and decree of this court be rendered perpetually restraining and enjoining said respondent from enforcing as against complainants such, or any, restriction upon the amount of spirituous liquors that may be lawfully dispensed by them. Complainants pray general relief.

HARRY G. McKANNAY,  
Solicitor for Complainants. [9]

State of California,  
City and County of San Francisco,—ss.

Waldemar Gnerich, being first duly sworn, deposes and says:

That he is one of the complainants named in the foregoing amended bill of complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information or belief and as to those matters that he believes it to be true.

WALDEMAR GNERICH.

Subscribed and sworn to before me this 21st day of April, 1921.

[Notarial Seal] J. D. BROWN,  
Notary Public in and for the City and County of  
San Francisco, State of California. [10]

12. *Waldemar Gnerich and Jeremiah T. Regan*

**Exhibit "A."**

Treasury Department,  
U. S. Internal Revenue,  
Form No. 1404.

Serial No. of Permit  
Calif. 1856.

Penal Sum of Bond—\$1000.

Date of Bond—Sept. 29, 1920.

**APPLICATION FOR PERMIT UNDER THE  
NATIONAL PROHIBITION ACT.**

(Instructions on Reverse Side.)

September 29, 1920.

Federal Prohibition Commissioner,  
Washington, D. C.

The undersigned, B. & S. Drug Co., Waldemar Gnerich, Jeremiah T. Regan, of 27 Stockton Street, San Francisco, California, co-partners engaged in the business or profession of Retail Druggists, hereby makes application for a permit to use and sell intoxicating liquor for other than beverage purposes, to wit:

1. In the manufacture of U. S. P. and N. F. preparations unfit for use as a beverage

2. In selling in quantities not exceeding one pint to persons not holding permits to purchase when medicated according to any one of seven formulae set forth in Sec. 61, Reg. 60.

3. In compounding medicinal preparations on physician's prescription or otherwise, medicated according to the standards set forth in Par. A, Sec. 60, Reg. 60, not put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

4. In selling retail as such to others holding permits, which confer authority to purchase and use intoxicating liquor for non-beverage purposes.

5. In dispensing as such on physician's prescriptions given on Form 1403 in quantities not exceeding one pint in ten days to some person and for nonbeverage purposes.

All sales of intoxicating liquors to be made through registered pharmacists Gnerich Weldmar and J. Regan.

The probable quantity that will be received or on hand during any quarterly period will be 283 proof gallons of alcohol; 157 proof gallons of whiskey; 5 wine gallons of wine; 5 proof gal. brandy.

\$2,000 bond covering this application, dated Sept. 29, filed with U. S. Government.

It is hereby certified that the undersigned has not within one year prior to the date hereof violated the terms of any permit issued under the National Prohibition Act or any law of the United States or of any State regulating traffic in liquor, and will observe the terms of any permit issued pursuant to this application and the provisions of all laws and regulations relative to the acts for which permit is issued.

B. & S. DRUG CO.,  
By WALDEMAR GNERICH,  
Copartner.

Recommended for Approval,  
E. C. YELLOWLEY,  
Acting Prohibition Director at San Francisco, Cal.

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Subscribed and sworn to before me this 29th day of  
Sept., 1920.

[Notarial Seal]

HUGH T. SIME. [11]

**Exhibit "B."**

Treasury Department, Serial No. Calif. 1856.  
United States Internal Revenue.  
Form 1405.

PERMIT ISSUED UNDER THE NATIONAL  
PROHIBITION ACT AND REGULATIONS  
ISSUED THEREUNDER.

Pro. Permit  
29-44141

Penal Sum of Bond—\$2000

Dated—Sept. 29th, 1920.

Office of Federal Prohibition Commissioner,  
Washington, D. C.

To B. & S. DRUG CO. (Waldemar Gnerich & Jeremiah T. Regan), 27 Stockton St., San Francisco, Calif.

Application having been duly presented and approved, you are hereby authorized and permitted to use and sell intoxicating liquor for other than beverage purposes, to wit:

In the manufacture of U. S. P. and N. F. preparations unfit for use as a beverage.

In selling in quantities not exceeding one pint to persons, not holding permits to purchase when medicated according to any one of the seven formulae set forth in Sec. 61, Reg. 60.

In compounding medicinal preparations on physician's prescription or otherwise, medicated accord-

ing to the standards set forth in Par. A, Sec. 60, Reg. 60, not put up in advance of orders for sale, and in quantities not exceeding 5 gallons in a period of ninety days.

In selling retail as such to others holding permits, which confer authority to purchase and use intoxicating liquor for non-beverage purposes.

In dispensing as such on a physician's prescription given on form 1403 in quantities not exceeding one pint in ten days to same person, and for non-beverage purposes.

This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period.

In the manufacture of the preparations listed on application dated Oct. 2d, 1920, and marked approved by this office.

This permit is effective from the date hereof, and will remain in force until December 31, 1921, unless revoked or renewed as provided by law or regulations.

This permit is granted under the conditions that the provisions of National Prohibition Act and Regulations issued thereunder will be strictly observed.

Dated this Nov. 26, 1920 *day of* ———, 192—.

K. J.

JOHN F. KRAMER,

Prohibition Commissioner. [12]

**Exhibit "C."**

TREASURY DEPARTMENT,  
Internal Revenue Service,  
San Francisco, Calif.

Calif. 1-856

Office of  
Federal Prohibition Director,  
California.

March 2, 1921.

Pro-QJB.

B. & S. Drug Company,  
27 Stockton Street,  
San Francisco, California.

Sirs:

The records of this office indicate that you are authorized to withdraw 100 gallons of distilled spirits per quarterly period. As you have already withdrawn for this quarter approximately 90 gallons, your application for one barrel grain alcohol is returned herewith disapproved. Your application for a quantity not to exceed 10 gallons would be favorably considered.

Respectively,  
E. C. YELLOWLEY,  
Acting Prohibition Director.

[Endorsed]: Receipt of a copy of the within Amended Complaint admitted this 21st day of April, 1921.

U. S. DISTRICT ATTORNEY,  
Attorney for Defendant.



Filed April 21, 1921. Walter B. Maling, Clerk.  
[13]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,  
Defendant.

**Order to Show Cause.**

In accordance with the prayer of the complaint on file herein, it is hereby ordered that the defendant be and appear before this court on Monday, the 18th day of April, 1921, at the hour of ten o'clock A. M. of said day, and then and there show cause, if any he may have, why, pending the final hearing and determination of this suit, he should not be restrained and enjoined from limiting or enforcing any limit that may be fixed by him upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act used or to be used by plaintiffs as duly licensed pharmacists, and all others similarly situated in their business of compounding and dispensing preparations authorized to be compounded

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and dispensed by licensed pharmacists in and by said National Prohibition Act.

It is also ordered that a copy of said bill of complaint and of this order be served on the defendant.

Dated: April 9th, 1921.

WM. C. VAN FLEET,  
U. S. District Judge.

[Endorsed]: Filed Apr. 9, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

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In the District Court of the United States in and  
for the Southern Division of the Northern Dis-  
trict of California, Second Division.

No.—

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Di-  
rector in and for the District of California,  
Defendant.

**Notice of Motion to Dismiss.**

To the Complainants Above Named, and to Harry  
G. McKannay, Their Attorney:

Notice is hereby given you and each of you that  
the defendant above named, on Monday, April 18,  
1921, at 10 o'clock A. M., or as soon thereafter as

counsel can be heard, will move the above-entitled court for an order dismissing complainants' bill of complaint.

Said motion will be made upon the grounds set out in the defendant's written motion to dismiss now on file, and will be based upon all the records and papers on file herein, and upon this notice.

Dated this 12th day of April, 1921.

FRANK M. SILVA,  
United States Attorney,  
WILFORD H. TULLY,  
Asst. United States Attorney,  
Attorneys for Defendant. [15]

[Endorsed]: Service of the above motion to dismiss is admitted this 12th day of April, 1921.

HARRY G. McKANNAY,  
Atty. for the Plaintiffs.

Filed Apr. 12, 1921. W. B. Maling, Clerk. By  
J. A. Schaertzer, Deputy. [16]

**20 Waldemar Gnerich and Jeremiah T. Regan**

In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

No. 603.

**WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,**

Complainants,

vs.

**E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,**  
Defendant.

**Decree.**

In the above-entitled suit, complainants' application for an injunction *pendente lite*, based upon the amended complaint on file herein, and defendant's motion to dismiss said bill, came on this day regularly to be heard; said application and motion were argued by counsel for the respective parties, Harry G. McKannay, Esq., appearing as counsel for the complainants and Wilford H. Tully, Esq., Assistant United States Attorney, appearing for defendant, and said application and motion were submitted to the Court for its decision, and thereupon consideration thereof, it was by the Court ORDERED, ADJUDGED AND DECREED as follows, to wit:

That the said application be and the same is hereby denied, and the said motion of defendant to dismiss

said bill of complaint be and the same is hereby granted, and the said bill is hereby dismissed upon the ground that it does not state facts sufficient to constitute a cause of action against said defendant as acting Prohibition Director in and for the District of California.

Done in open court this 2d day of May, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed and entered May 3, 1921.  
Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

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In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

No. 603—IN EQUITY.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Complainants and Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Commissioner in and for the District of California,

Defendant and Respondent.

**Assignment of Errors.**

Now come Waldemar Gnerich and Jeremiah T. Regan, citizens of the United States of America and

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residents of the Southern Division of the Northern District of California, copartners doing business under the firm name and style of B. & S. Drug Company, and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the above-entitled United States District Court made and entered herein on the 2d day of May, 1921, wherein and whereby it was ordered, adjudged and decreed that the prayer of complainants' bill of complaint be denied and that said bill be dismissed, and said complainants and appellants file the following assignment of errors upon which they will rely upon the prosecution of their appeal herein, and do hereby assign that the above-entitled United States District Court erred in the following particulars, to wit:

### I.

The said District Court erred in granting the motion of [18] the defendant to dismiss complainants' bill of complaint on the ground that said bill did not present a cause of action in equity under the Constitution and laws of the United States.

### II.

The said District Court erred in granting the motion of the defendant to dismiss complainants' bill of complaint on the ground that the facts alleged in the bill of complaint are insufficient to state a cause of action in equity.

### III.

The said District Court erred in holding and deciding that said Honorable Court had no jurisdiction over the subject matter of said cause or to grant the

relief therein prayed for or any part thereof.

IV.

The said District Court erred in holding and deciding that defendant did not exceed the power conferred upon him by law, and did not act without his jurisdiction, in enforcing against complainants the purported limitation contained in the permit of appellants to purchase, use and dispense "intoxicating liquors," as said term is defined in the National Prohibition Act, for other than beverage purposes.

V.

The said District Court erred in holding and deciding that the said purported limitation on the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which complainants could purchase, use and dispense in their business as pharmacists, as set forth in said permit, was not null and void and of no force or effect, and was within the jurisdiction of the "Prohibition Commissioner" at Washington to make and within the jurisdiction of the respondent to enforce. [19]

VI.

The said District Court erred in holding and deciding that the "Prohibition Commissioner" had the power to make and enforce as a rule or regulation of the Treasury Department of the United States, a limitation placed by him upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that could be purchased, used and dispensed by the complainants in their business as pharmacists under the terms of said National Prohibition Act, without having such limi-

tation of his authority to make the same first authorized and published under and by the rules and regulations authorized by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury of the United States.

#### VII.

The said District Court erred in holding and deciding that the National Prohibition Commissioner has the power to make and enforce any limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, other than or different from the limitation or restriction contained and expressed in the Eighteenth Amendment to the Constitution of the United States, the National Prohibition Act itself, or the Rules and Regulations duly published under the authority thereof.

#### VIII.

The said District Court erred in holding and deciding that the "National Prohibition Commissioner" has authority and jurisdiction to make and enforce a limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which could be purchased, used and dispensed by the complainants in their business as pharmacists, other than or different from that prescribed, fixed or determined by the amount [20] of the bond furnished by complainants under the provisions of paragraph "A," Section 60 of "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of Intoxi-



ating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States."

IX.

The said District Court erred in holding and deciding that the defendant had authority and that it was his duty and within his jurisdiction, to enforce as a lawful Regulation of the Treasury Department of the United States, the personal opinion, wish or desire of the "Prohibition Commissioner" to restrict the amount of "intoxicating liquor" as that term is defined in the National Prohibition Act, that could be purchased, used and dispensed by complainants in their business as pharmacists, without said personal opinion, wish or desire of said Prohibition Commissioner being first approved by the Commissioner of Internal Revenue and the Secretary of the Treasury of the United States, and published as a uniform Rule and Regulation of the Treasury Department, to be followed in enforcing the provisions of said National Prohibition Act.

WHEREFORE, appellants, Waldemar Gnerich and Jeremiah T. Regan, copartners doing business under the firm name and style of B. & S. Drug Company, pray that the said decree may be reversed, and that said District Court for the Southern Division of the Northern District of California be directed to enter its order, judgment and decree perpetually restraining and enjoining said respondent, E. C. Yellowley, or his successor in office, as acting Prohibition [21] Director of the District

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of California, from enforcing as against complainants and appellants and others similarly situated, the restriction or limitation hereinabove set forth or referred to, or any restriction or limitation, upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that may be lawfully purchased, used and dispensed by them *if* their businesses as pharmacists, or any limitation or restriction other or different than those set forth and proclaimed in the Eighteenth Amendment to the Constitution of the United States, the National Prohibition Act, and the Rules and Regulations of the Treasury Department of the United States duly published thereunder in the manner required thereby.

Dated this 23d day of May, 1921.

HARRY G. McKANNAY,

Solicitor for Complainants and Appellants.

[Endorsed]: Receipt of a copy of the within assignment of errors admitted this 24th day of May, 1921.

FRANK M. SILVA,

U. S. Attorney.

Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

In the District Court of the United States in and for  
the Southern Division of the Northern District  
of California, Second Division

EQ. 603.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director  
in and for the District of California,  
Defendant.

**Petition for Appeal (and Order Allowing Appeal).**  
To the Honorable WILLIAM C. VAN FLEET, Dis-  
trict Judge, etc.:

The above-named plaintiffs feeling themselves ag-  
grieved by the decree made and entered in this cause  
on the 2d day of May, 1921, do hereby appeal from  
the said decree to the Circuit Court of Appeals for  
the Ninth Circuit for the reasons specified in the  
assignment of errors, which is filed herewith, and  
pray that their appeal be allowed, and that citation  
issue as provided by law, and that a transcript of  
the record proceedings and papers upon which said  
decree was based, duly authenticated, may be sent to  
the United States Circuit Court of Appeals for the  
Ninth Circuit, sitting at San Francisco, in the South-  
ern Division of the Northern District of California.

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Dated May 9th, 1921.

HARRY G. McKANNAY,

Solicitor for Complainants and Appellants.

Ordered appeal allowed and cost bond fixed in the sum of Three Hundred Dollars.

WM. C. VAN FLEET,

Judge.

May 24th, 1921. [23]

[Endorsed]: Receipt of a copy of the within petition for appeal admitted this 24th day of May, 1921.

FRANK M. SILVA,

United States Attorney.

Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

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**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we, Waldemar Gnerich and Jeremiah T. Regan, as principals, and Globe Indemnity Company, as surety, are held and firmly bound unto E. C. Yellowley, as acting Prohibition Director in and for the District of California, in the full and just sum of Three Hundred (300) Dollars, to be paid to the said E. C. Yellowley, as acting Prohibition Director aforesaid, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of

May, in the year of our Lord one thousand nine hundred and twenty-one (1921).

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, in a suit depending in said court, between Waldemar Gnerich and Jeremiah T. Regan, Copartners Doing Business Under the Firm Name and Style of B. & S. Drug Company, Complainants, vs. E. C. Yellowley, as Acting Prohibition Director in and for the District of California, Defendant, a decree was rendered against the said complainants, and the said complainants, having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree in the aforesaid suit, and a citation directed to the said E. C. Yellowley, as acting Prohibition Director in and for the District of California, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said complainants and appellants shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WALDEMAR GNERICH.

JEREMIAH T. REGAN. (Seal)

GLOBE INDEMNITY COMPANY. (Seal)

By JOHN H. ROBERTSON,  
Agent and Attorney in Fact.

30 *Waldemar Gnerich and Jeremiah T. Regan*

Acknowledged before me the day and year first above written.

S. M. PALMER.

[Endorsed]: Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,

Judge.

Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

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In the District Court of the United States in and for the Southern Division of the Northern District of California, Second Division.

IN EQUITY—No. 603.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Plaintiffs,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Defendant.

**Praeceptum for Transcript of Record on Appeal.**

To Walter B. Maling, Clerk of the Above-entitled Court:

Please prepare and duly authenticate for the appeal of the plaintiffs, Waldemar Gnerich and Jeremiah T. Regan, copartners doing business under

the firm name and style of B. & S. Drug Company, to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered in the above-entitled cause May 2d, 1921, a transcript incorporating the following portions of the record therein, and none other:

1. Amended bill of complaint.
2. Order to show cause.
3. Subpoena ad respondendum.
4. Notice of motion to dismiss appeal.
5. Decree.
6. Assignment of errors.
7. Petition for appeal and order granting appeal.
8. Bond on appeal.
9. Citation on appeal.
10. Praeceptum for transcript of record on appeal.
11. Certificate of Clerk U. S. District Court to transcript on appeal.

Dated, June 15th, 1921.

HARRY G. McKANNAY,  
Solicitor for Plaintiffs and Appellants. [26]

[Endorsed]: Receipt of a copy of the within praecipe admitted this 18th day of June, 1921.

For the U. S. District Attorney,  
FRANK M. SILVA,  
MERVIN C. LERNHART.

Filed Jun. 18, 1921. W. B. Maling, Clerk. By  
J. A. Schaertzer, Deputy Clerk. [27]

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

No. 603.

**WALDEMAR GNERICH and JEREMIAH T.  
REGAN**, Copartners Doing Business Under  
the Firm Name and Style of **B. & S. DRUG  
COMPANY**,

Plaintiffs,

vs.

**E. C. YELLOWLEY**, as Acting Prohibition Director  
in and for the District of California,  
Defendant.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing twenty-eight pages, numbered from 1 to 28, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript on appeal, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$11.70; that said amount was paid by Harry G. McKannay, attorney for plaintiffs; and that the original citation issued in said cause is hereto annexed.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of June, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [28]

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**Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to E. C. Yellowley, as Acting Prohibition Director in and for the District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein Waldemar Gnerich and Jeremiah T. Regan, copartners doing business under the firm name and style of B. & S. Drug Company are appellants, and you, the said E. C. Yellowley, as acting Prohibition Director in and for the District of California, are respondent, and appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said order allowing appeal mentioned, should not be corrected, and why speedy

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justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 24th day of May, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge. [29]

United States of America,—ss.

On this 24th day of May, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared before me, John G. Weir, the subscriber, and makes oath that he delivered a true copy of the within citation to Frank M. Silva, United States Attorney for the Northern District of California.

JOHN G. WEIR.

Subscribed and sworn to before me at San Francisco, this 24th day of May, A. D. 1921.

[Seal] J. A. SCHAERTZER,  
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: No. 603. United States District Court for the Southern Division of the Northern District of California, Second Division. Waldemar Gnerich, et al., etc., Appellant, vs. E. C. Yellowley, etc. Citation on Appeal. Filed May 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3706. United States Circuit Court of Appeals for the Ninth Circuit. Walde-  
mar Gnerich and Jeremiah T. Regan, Copartners  
Doing Business Under the Firm Name and Style of  
B. & S. Drug Company, Appellants, *vs.* E. C.  
Yellowley, as Acting Prohibition Director in and for  
the District of California, Appellee. Transcript of  
Record. Upon Appeal from the Southern Division  
of the United States District Court for the North-  
ern District of California, Second Division.

Filed June 27, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Ap-  
peals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the District Court of the United States in and  
for the Southern Division of the Northern Dis-  
trict of California, Second Division.

IN EQUITY—No. 603.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Plaintiffs and Appellants,  
*vs.*

E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Defendant and Appellee.

**Order Extending Time to and Including July 22, 1921, to File Record and Docket Cause.**

Upon motion of Harry G. McKannay, Esquire, solicitor for the above-named plaintiffs and appellants, and good cause appearing therefor:

**IT IS ORDERED** that the clerk of the above-entitled court may have and he is hereby given, up to and including the 22d day of July, 1921, within which to prepare, authenticate and certify to the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record on appeal in the above-entitled cause.

Dated June 18th, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 3706. United States Circuit Court of Appeals for the Ninth Circuit. Waldemar Gnerich, et al., etc., Plaintiffs and Appellants, vs. E. C. Yellowley, as Acting Prohibition Director, etc., Defendant and Appellee. Order Extending Time of Clerk to File Record on Appeal. Filed Jun. 18, 1921. F. D. Monekton, Clerk. Refiled Jun. 27, 1921. F. D. Monekton, Clerk.

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,**

**Appellants,**

**vs.**

**S. F. RUTTER, as Prohibition Director in and for  
the District of California,**

**Appellee.**

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**Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.**

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**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

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At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-first day of October, in the year of our Lord one thousand nine hundred and twenty-one. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

**Order of Submission.**

ORDERED appeal in the above-entitled cause argued by Mr. Harry G. McKannay, counsel for the appellants, and by Mr. Thomas J. Sheridan, Assistant United States Attorney and counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file brief to-day; counsel for appellants to reply

thereto fifteen (15) days from date; further ordered leave granted Mr. Theodore Bell to file brief as *amicus curiae* within fifteen days; counsel for appellee granted leave to reply to said brief within fifteen days, and with leave to counsel for the appellants to reply to reply brief of appellee, if so advised.

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At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the Ninth day of January, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: \* \* \* Walde-



mar Gnerich and Jeremiah T. Regan, Copartners  
Doing Business Under the Firm Name and Style of  
B. & S. Drug Company, vs. E. Forrest Mitchell,  
Substituted in the Place and Stead of E. C.  
Yellowley, as Acting Prohibition Director in and  
for the District of California, Appellee. No. 3706.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

**WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,**

Appellants,

vs.

**E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Appellee.**

**Stipulation and Order Substituting E. Forrest  
Mitchell for E. C. Yellowley, as Acting Pro-  
hibition Director, etc.**

WHEREAS, since the filing of the complaint  
for injunction in the above-entitled matter in the  
District Court of the United States in and for the  
Southern Division of the Northern District of Cali-  
fornia, Second Division, and the perfecting of the  
appeal herein, defendant in error, E. C. Yellowley,  
has resigned his office as Acting Prohibition Direc-  
tor in and for the District of California, and E.

Forrest Mitchell has been duly appointed to such office and is now the duly qualified and acting Prohibition Director in and for the District of California,—

IT IS THEREFORE STIPULATED that the said E. Forrest Mitchell may be, and is, hereby substituted as defendant in error in the above-entitled matter and in all proceedings to be hereafter had and taken in the matter of this appeal in the place and stead of E. C. Yellowley, reserving on the part of the defendant in error and said Mitchell all objections that are or could have been made originally by said E. C. Yellowley as to said action or that it was or was not lawfully commenced as against him.

Dated: December 3, 1921.

HARRY G. McKANNAY,  
K. J.

Attorney for Plaintiff in Error.

JOHN T. WILLIAMS,  
United States Attorney.

T. J. SHERIDAN,  
Asst. United States Attorney.

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Attorneys for Defendant in Error.

Dated: San Francisco, Calif., December 3, 1921.  
So ordered.

W. H. HUNT,  
United States Circuit Judge.

[Endorsed]: Stipulation and Order Substituting  
E. Forrest Mitchell for E. C. Yellowley, as Acting

Prohibition Director, etc. Filed December 3, 1921.  
F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. RE-  
GAN, Copartners Doing Business Under the  
Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Appellee.

**Opinion U. S. Circuit Court of Appeals.**

Upon Appeal from the Southern Division of the  
United States District Court for the Northern  
District of California, Second Division.

Before GILBERT, ROSS and MORROW, Circuit  
Judges.

ROSS, Circuit Judge:

An addition to the Constitution of the United  
States made by the adoption of the Eighteenth  
Amendment prohibits the manufacture, sale, or  
transportation of intoxicating liquors for beverage  
purposes within the United States and all territory  
subject to the jurisdiction thereof, and also the im-

portation thereof into or the exportation thereof from the United States and all territories subject to its jurisdiction, and further declares that the Congress and the several States shall have concurrent power to enforce those provisions by appropriate legislation.

Acting under and in pursuance of the power thus conferred upon it by the Constitution, Congress passed, on October 28th, 1919, an act entitled "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and all other lawful industries." 41 Stat. 305.

The decree appealed from dismissed a bill of complaint filed by the appellant Drug Company, on the ground that it did not state facts sufficient to constitute a cause of action against the defendant as Acting Prohibition Director in and for the District of California. After setting forth the jurisdictional facts and the nature of the appellant's business, and the appointment and qualification of the defendant Prohibition Director, the bill alleges that on January 16, 1920, the Federal Prohibition Commissioner and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, published "Regulations 60 Relative to the Manufacture, Sale, Barter, Transportation, Importation, Exportation, Delivery, Furnishing, Purchase, Possession and Use of In-

toxicating Liquor under Title II of the National Prohibition Act of October 28, 1919, Providing for the Enforcement of the Eighteenth Amendment of the Constitution of the United States," which rules and regulations are still in effect, and that pursuant thereto the complainants on the 29th day of September, 1920, applied for and were granted by the Federal Prohibition Commissioner at Washington, on the form prescribed by the regulations, a permit "to use and sell intoxicating liquors for other than beverage purposes," in the following particulars, to wit:

"1. In the manufacture of United States Pharmacopeia and National Formulary preparations unfit for use as a beverage.

"2. In selling in quantities not exceeding one pint, to persons not holding permits to purchase when medicated according to any one of the seven formulae set forth in section 61 of the aforesaid regulations prescribed by said Treasury Department.

"3. In compounding medicinal preparations on physicians' prescriptions or otherwise medicated according to the standard set forth in paragraph 'A' Section 60 of the aforesaid regulations, prescribed by said Treasury Department, and put up in advance of order for sale, and in quantities not exceeding five gallons in a period of ninety days.

"4. In selling retail as such, to others holding permits which confer authority to purchase

and use intoxicating liquors for nonbeverage purposes.

“5. In dispensing as such on physicians’ prescriptions given on Form 1403 prescribed by the Treasury Department of the United States Internal Revenue, in quantities not exceeding one pint in ten days to the same person, and for nonbeverage purposes.”

The bill further alleges that the complainants were required by the regulations to set forth, and in their application for the permit did set forth, that the kind and the probable maximum quantity of “intoxicating liquors” that they desired to sell or use in their business during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whiskey, and 5 gallons of wine and four and one-half proof gallons of brandy; that their said application was duly verified and was accompanied by a bond in the form and amount required by the regulations to cover the maximum quantities of intoxicating liquors set forth in the application as desired to be used or sold by them, a copy of which application was annexed to and made a part of the bill. The bill alleges that under date November 26, 1920, the Prohibition Commissioner at Washington issued to the complainants a permit under and in pursuance of the National Prohibition Act authorizing and permitting them to use and sell intoxicating liquors for other than beverage purposes, in conformity with their said application, “but arbitrarily and without authority of law or regulation, inserted in said permit the restriction

that 'this permit is issued for one hundred gallons of distilled spirits and five gallons of wine' for each quarterly period," which permit is also annexed to and made a part of the bill.

The bill alleges that the said permit has not been revoked, and that by virtue of it the complainants, on February 17, 1921, made application to the defendant as Prohibition Director for the District of California, on the form and in the manner prescribed by the regulations of the Treasury Department, for a permit to purchase one barrel of grain alcohol for the uses set forth in the permit, which application was on the 2d of March, 1921, returned to the complainants by the defendant, for the reason that the purchase of the said barrel of alcohol would allow the complainants to withdraw in excess on one hundred gallons of distilled spirits per quarter, as more fully appears from his letter, a copy of which is annexed to and made a part of the bill; that numerous other similar applications of the complainants for permits to purchase alcohol and intoxicating liquors had been likewise disapproved by the defendant upon like grounds, all of which refusals it is alleged have resulted in great injury to the complainants in their business of pharmacists, and have prevented them from lawfully purchasing such business in using, dispensing, and selling such alcohol and intoxicating liquors for other than beverage purposes, to their great and irreparable damage.

The bill alleges that the restriction so fixed by the Commissioner in the said permit "is arbitrary, un-

lawful, unreasonable, and void as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the Government of the United States, and is an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of 'intoxicating liquor' for medicinal and non-beverage purposes; and is a violation of the rights, privileges, and duties conferred upon complainants as pharmacists, under the provisions of said act"; that the said restriction is not necessary to the enforcement of any of the provisions of that act, nor is it authorized by any rule or regulation published by the authority thereof; that because of the said restriction the complainants have been prevented from filling many prescriptions lawfully issued by licensed physicians resident in the Southern Division of the Northern District of California, and issued by them under permits on the form and in the manner prescribed by law.

The prayer of the bill was that the defendant to it show cause why the limit so fixed in the permit issued to complainants should not by him be disregarded pending the final hearing and determination of the cause, and that upon final hearing the defendant be perpetually restrained from enforcing as against the complainants the restrictions complained of.

The constitutional amendment imposes no prohibition upon either the manufacture, sale, or transportation of intoxicating liquor for non-beverage



purposes, nor does it undertake in any way to define what shall constitute intoxicating liquor, but Congress did the latter in its National Prohibition Act, and also enacted numerous most stringent provisions for the giving effect to the constitutional amendment, and in the endeavor to prevent its evasion.

Section 1 of Title II of the act defines the meaning of the words "person," "commissioner," "application," "permit," "bond," as used therein, and by the 7th subdivision of that section declares:

"The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records."

Section 4 enumerates various articles therein declared not subject to the provisions of the Act if they correspond with certain specified descriptions and limitations, in which event the commissioner is authorized to issue a permit for their sale. By Section 5, however, it is provided that whenever the commissioner has reason to believe that any of such articles do not correspond with the descriptions and limitations specified in Section 4, he shall make an

investigation upon prescribed notice, and in the event that the manufacturer of such an article fails to show to his satisfaction that the article corresponds to the descriptions and limitations provided in Section 4, his permit shall be revoked. And that section concludes with the provision that "The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the Court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article."

By section 6 it is declared, among other things, that no one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as therein provided. The life of such permits is prescribed, and it is declared that they shall specify the quantity and kind of liquor to be purchased, and the purpose for which it is to be used, power being given the commissioner to prescribe the form of all such permits and of the applications therefor, and to require bond in such form and amount as he may prescribe, and further, as follows:

"No permit shall be issued to any one to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State

to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used."

And section 6 contains this further provision:

"In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in Section 5 hereof."

We think we are precluded from deciding or considering the merits of the case, first, by the fact that the Commissioner of Internal Revenue was not made a party to the suit, and, secondly, by the fact that the defendant acting prohibition officer ceased to be such during its pendency.

It is the Commissioner of Internal Revenue, as will be seen from the provisions of the National Prohibition Act that have been referred to, who is authorized to issue a permit for the manufacture,

sale, purchase, transportation, or prescription of any intoxicating liquor, and the bill in the present case expressly alleges that it was the Commissioner who issued the permit upon which the complainants relied—alleging the invalidity of that portion of it restricting the permit to one hundred gallons of distilled spirits and five gallons of wine; and yet the Commissioner was not made a party to the bill, the very purpose of which was to control his action. That under such circumstances the bill could not be maintained, even conceding that it states facts sufficient to constitute a cause of action in the complainants' favor is clearly shown by the decision of the Supreme Court in *Warner Valley Stock Company vs. Smith*, 165 U. S. 28, and cases there cited.

Even if the Acting Prohibition Director, made sole defendant in the bill, could be held as agent of the Commissioner to dispense with the necessity of making the latter a party, that defendant ceased to be such officer pending the suit.

The judgment of dismissal is

*Affirmed.*

[Endorsed]: Opinion. Filed January 9, 1922.  
F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 3706.

**WALDEMAR GNERICH and JEREMIAH T.  
REGAN**, Copartners Doing Business Under  
the Firm Name and Style of **B. & S. DRUG  
COMPANY**,

Appellants,

vs.

**E. FORREST MITCHELL**, Substituted in the  
Place and Stead of **E. C. YELLOWLEY**, as  
Acting Prohibition Director in and for the  
District of California,

Appellee.

**Decree U. S. Circuit Court of Appeals.**

Appeal from the Southern Division of the District  
Court of the United States for the Northern Dis-  
trict of California, Second Division.

This cause came to be heard on the Transcript of  
the Record from the Southern Division of the Dis-  
trict Court of the United States for the Northern  
District of California, Second Division, and was  
duly submitted.

On consideration whereof, it is now here ordered,  
adjudged and decreed by this Court, that the judg-  
ment of dismissal of the said District Court in this  
cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered Janu-  
ary 9, 1922. F. D. Monckton, Clerk. By Paul P.  
O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twentieth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T. REGAN, Copartners Doing Business Under the Firm Name and Style of B. & S. DRUG COMPANY,

Appellants,

vs.

E. FORREST MITCHELL, Substituted in the Place and Stead of E. C. YELLOWLEY, as Acting Prohibition Director in and for the District of California,

Appellee.

**Order Denying Petition for Rehearing.**

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the case was heard, it is ORDERED that the

Petition, filed February 6, 1922, on behalf of the appellants, for a rehearing of the above-entitled case be, and hereby is denied.

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In the United States Circuit Court of Appeals in  
and for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Appellee.

**Notice of Motion for Order Substituting S. F.  
Rutter in Place of E. C. Yellowley as Appellee  
Herein.**

To JOHN T. WILLIAMS, United States Attorney,  
and to T. J. SHERIDAN, Assistant United  
States Attorney, Attorneys for Appellee:

YOU AND EACH OF YOU WILL PLEASE  
TAKE NOTICE AND NOTICE IS HEREBY  
GIVEN that on Monday, the 15th day of May, 1922,  
at the hour of 10 o'clock A. M. of said day, at the  
courtroom of the above-entitled United States Cir-  
cuit Court of Appeals, in and for the Ninth Circuit,  
situate in the United States Post Office Building,

Seventh and Mission Streets, in the City and County of San Francisco, California, the undersigned on behalf of the appellants will present his motion to the above-entitled court for its order substituting S. N. Rutter in the place and stead of E. C. Yellowley as appellee in all matters and proceedings hereinafter to be taken on the appeal of said matter.

Said motion will be made upon the ground that said E. C. Yellowley, appellee named in said original proceeding, ceased to be Acting Prohibition Director in and for the District of California pending the appeal herein and that E. Forrest Mitchel was duly appointed the successor in office of the said E. C. Yellowley pending the appeal herein and by stipulation of the parties on file herein was substituted as appellee in the place and stead of E. C. Yellowley; and furthermore, upon the ground that the said S. F. Rutter has, since the decision of this said matter by the above-entitled court, been duly appointed to the office of Prohibition Director in and for the District of California in the place and stead of the said E. Forrest Mitchel, and is now the duly qualified and acting Prohibition Director in and for the District of California, and that said substitution is necessary and proper for the purpose of determining the merits of said cause on appeal inasmuch as said proceeding was lawfully commenced against the said E. C. Yellowley in his official capacity and relates to the discharge of the official duties of Prohibition Director under the constitution, laws and statutes of the United States, and for said reasons



said cause should be continued against the said S. F. Rutter as such officer.

Said motion will be based upon this notice and upon all the papers and documents on file or of record, and upon the affidavit of Harry G. McKannay served upon you herewith, and upon that certain Act of Congress set forth in 30 Statutes at Large, at page 822.

Dated: May 8th, 1922.

HARRY G. McKANNAY,  
Attorney for Appellants.

[Endorsed]: Notice of Motion for Order Substituting S. F. Rutter in Place of E. C. Yellowley as Appellee. Filed May 9, 1922. F. D. Monekton, Clerk.

Receipt and due service of a copy of the within notice of motion for order substituting defendant and a copy of the affidavit of Harry G. McKannay to be used on application of said Order acknowledged this 9th day of May, 1922.

JOHN T. WILLIAMS,  
Attorney for Appellee.

In the United States Circuit Court of Appeals in  
and for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Appellee.

**Affidavit in Support of Application for Order Sub-  
stituting S. F. Rutter as Appellee.**

State of California,  
City and County of San Francisco,—ss.

Harry G. McKannay, being first duly sworn, de-  
poses and says:

That he is the attorney and solicitor for appel-  
lants in the above-entitled cause, and as such is more  
familiar with the facts and matters herein stated  
than appellants and for that reason makes this  
affidavit; that since the perfecting of the appeal in  
the above-entitled cause from the United States  
District Court to the United States Circuit Court  
of Appeals and according to affiant's information  
and belief during the month of July, 1921, said E.  
C. Yellowley resigned as Acting Prohibition Direc-  
tor in and for the District of California and E.

Forrest Mitchel was duly appointed Prohibition Director in and for the District of California, and thereafter qualified as such and continued to hold such office until on or about the 1st day of March, 1922, when the said E. Forrest Mitchel resigned and S. F. Rutter was appointed in his place and stead as Prohibition Director in and for the District of California; that the said S. F. Rutter ever since has been, and he now is, the duly qualified and acting Prohibition Director in and for the District of California; that after the argument of said cause before the United States Circuit Court of Appeals and the submission of the same to said court for its determination, the attorneys and solicitors for the appellee therein named filed herein their supplemental citation of authority wherein the attention of this Court and of affiant for the first time was directed to the fact that said E. C. Yellowley had ceased to be Prohibition Director in and for the District of California and that E. Forrest Mitchel had been appointed and qualified as such officer in the place and stead of the said E. C. Yellowley and requested this Court to take judicial notice that the said defendant in error resigned his office and had been succeeded by another person and suggested that the cause could not be further maintained against the Prohibition Director in and for the District of California inasmuch as the defendant in error named in the original bill of complaint had ceased to be such officer and cited the case of Warner Valley Stock Co. vs. Smith, 165 U. S., page 28, 41 L. Ed. 621, as authority for such contention; that upon receipt

of such supplemental authority by affiant, affiant directed the attention of the United States Attorney, as attorney for said appellee and defendant in error, to the Act of Congress of February 8, 1899, which Act is set forth in 30 Statutes at Large, at page 822, wherein and whereby it is provided as follows:

“No suit, action or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office. But, in such event, the court on motion or supplemental petition filed at any time within twelve months thereafter showing the necessity for the survival thereof to obtain a settlement of the questions involved may allow the same to be maintained by or against his successor in office and the court may make such order as should be equitable for the payment of costs.”

and further called the attention of said United States Attorney to the case of *Smietanka, Collector, vs. Ind. Steel Co.*, decided Nov. 15, 1921, by the United States Supreme Court to the effect that such an action does not abate upon the death or resignation of an officer of the United States; that thereupon and on the 3d day of December, 1921, the said United States Attorney signed the stipulation in writing for the substitution of E. Forrest Mitchel as defendant in error in the above-entitled matter

and all proceedings to be hereafter had and taken in the matter of this appeal in the place and stead of the said E. C. Yellowley, which said stipulation was on said 3d day of December, 1921, duly filed among the records of said cause by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; that no order has been made by this Honorable court substituting either the said E. Forrest Mitchel or the said S. F. Rutter as appellee in the place and stead of the said E. C. Yellowley in the above-entitled cause; that according to affiant's information and belief both the said E. Forrest Mitchel, during his incumbency of the office of Prohibition Director of the District of California, and the said S. F. Rutter ever since his incumbency of said office have, and each of them has, as such Prohibition Director, done and performed and continued in force all of the acts and things complained of in said bill of complaint against the said E. C. Yellowley as Acting Prohibition Director in and for the District of California. Affiant therefore avers that the proceeding heretofore commenced by appellants against E. C. Yellowley as Acting Prohibition Director was brought against him in relation to his official acts and related to the discharge of his official duties; that it is necessary to obtain a settlement of the questions therein involved, which questions relate to the legality and constitutionality of certain acts of said official under the laws and Constitution of the United States and relate to the constitutionality of certain regulations and laws of the United States, as more fully appears from the tran-

script of the record on file in this court and the briefs of the parties; that it is necessary in order to obtain a settlement of the questions involved that said cause should be maintained against the successors in office of the said E. C. Yellowley in order that justice should be done.

WHEREFORE affiant prays that a citation be issued to the said S. F. Rutter to show cause before this court at a day certain why he should not be substituted in the place and stead of E. C. Yellowley as appellee herein and why such other and further orders should not be made by this court in relation thereto as may be proper in the premises.

HARRY G. McKANNAY.

Subscribed and sworn to before me this 8th day of May, 1922.

J. D. BROWN,

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Affidavit in Support of Application  
for Order Substituting S. F. Rutter as Appellee.  
Filed May 9, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Di-  
rector in and for the District of California,  
Appellee.

**Citation.**

The President of the United States of America, to  
S. F. RUTTER, as Acting Prohibition Director  
in and for the District of California.

YOU ARE HEREBY CITED AND ADMON-  
ISHED to be and appear at the courtroom of the  
United States Circuit Court of Appeals, for the  
Ninth Circuit, in the United States Post Office  
Building, in the City and County of San Francisco,  
State of California, on the 15th day of May, 1922,  
at the hour of ten o'clock A. M. of said day, and  
then and there show cause, if any there be, why an  
order of the above-entitled Circuit Court of Appeals  
should not be made substituting you, the said S. F.  
Rutter, as Prohibition Director in and for the Dis-  
trict of California, as appellee in the above-entitled  
cause and all proceedings hereinafter to be had

therein in the place and stead of E. C. Yellowley, heretofore the Acting Prohibition Director in and for the District of California and named as appellee in the foregoing matter, and why such other and further orders should not be made in connection therewith as may be meet and proper in the premises.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, this 9th day of May, 1922.

W. H. HUNT,  
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

Service by copy of the within Citation is hereby admitted this — day of April, 1922, together with a copy of the affidavit of Harry G. McKannay praying for the issuance of said Citation.

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Attorney for Appellee.

### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named S. F. Rutter, as Acting Prohibition Director, by handing to and leaving a true and correct copy thereof with C. H. Wheeler, as Chief Clerk or Chief Deputy of "S. F. Rutter," as Acting Pro. Director, personally, at San



Francisco, in said District on the 11th day of May,  
A. D. 1922.

J. B. HOLOHAN,

U. S. Marshal.

By Fred S. Field,

Deputy.

[Endorsed]: Citation on Motion for Order Substituting Party Appellee. Filed May 12, 1922.  
F. D. Monekton, Clerk.

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At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable MAURICE T. DOOLING, District Judge.

No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

E. FORREST MITCHELL, Substituted for E. C.  
YELLOWLEY, as Acting Prohibition Director  
in and for the District of California,

Appellee.

**Order Granting Motion for Substitution of Party  
Appellee.**

Upon consideration of the motion of appellants for order substituting S. F. Rutter in the place of E. Forrest Mitchell, as appellee and on the affidavit of Mr. Harry G. McKannay, in support of said motion, and upon the oral presentation of said motion by Mr. McKannay, as counsel for the appellants, and in support of said motion, Mr. Thomas J. Sheridan, Assistant United States Attorney and counsel for the appellee, having been heard in opposition thereto, and good cause therefor appearing, it is hereby ORDERED that said motion be, and hereby is granted.

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for  
the District of California,

Appellee.

**Petition for Appeal from Circuit Court of Appeals  
for the Ninth Circuit to Supreme Court of the  
United States.**

Waldemar Gnerich and Jeremiah T. Regan, appellants above named and petitioners herein, herewith present their petition in the above-entitled cause for appeal to the Supreme Court of the United States, and in connection herewith the petition of the said appellants respectfully shows and presents: That the above cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a final decree has therein been rendered on the 9th day of January, 1922, affirming the decree of the District Court of the United States for the Northern District of California, Second Division, in dismissing the bill of complaint of complainants; that subsequent to the above men-

tioned decree of this Honorable Court, these appellants petitioned this Court for a rehearing of said cause which petition for rehearing was denied on the 20th day of February, 1922; that this Honorable Court has made an order staying issuance of the Mandate until this appeal is perfected; that the matter in controversy in this cause exceeds the value of One Thousand (1,000.00) Dollars besides costs, as shown by the affidavit annexed hereto; that this cause is one in which the judgment or decree of the Circuit Court of Appeals is not made final by any law of the United States, and is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

WHEREFORE, the said petitioners and appellants, feeling themselves aggrieved by the judgment so rendered and entered by the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, hereby appeal from said judgment and decree of said last named Court, to the Supreme Court of the United States and respectfully pray that said appeal be allowed to them in the above-entitled cause and that an order be made granting such appeal and directing the clerk of the United States Circuit Court of Appeal for the Ninth Circuit to send the records and proceedings in the said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be re-

viewed and if error be found, corrected according to the laws and customs of the United States.

WALDEMAR GNERICH,  
JEREMIAH T. REGAN,  
Petitioners and Appellants.

HARRY G. McKANNAY,  
Attorney for Waldemar Gnerich and Jeremiah T.  
Regan, Petitioners and Appellants.

State of California,  
City and County of San Francisco,—ss.

Waldemar Gnerich, being duly sworn, says:

I am one of the appellants named in the foregoing petition for appeal and am a member of the copartnership conducting the general drug and pharmaceutical business affected by the acts of the appellee as set forth in the bill of complaint. I am familiar with the amount of business done by said copartnership and with the amount of prescription business which has been lost to said copartnership because of the ruling of the Prohibition Commissioner, and I know that the net value thereof prior to the filing of said original action was and is in excess of One Thousand (\$1,000) Dollars.

WALDEMAR GNERICH.

Subscribed and sworn to before me this 13th day of March, 1922.

[Seal]

JOHN WISNOM,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Petition for Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for  
the District of California,

Appellee.

**Order Allowing Appeal to U. S. Supreme Court.**

This day came Waldemar Gnerich and Jeremiah T. Regan, appellants in the above-entitled cause, and by Harry G. McKannay, their attorney and counsel, presented their petition for an appeal, accompanied by an assignment of errors relied on, and upon motion duly made, asked the allowance of said appeal, whereupon it is ORDERED and ADJUDGED that said appeal and claim of appeal be, and the same is, hereby allowed to the Supreme Court of the United States upon the filing of a bond on appeal by the said appellants in the sum of Five Hundred (\$500.00) Dollars, the same to operate as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated: May 17, 1922.

W. H. HUNT,  
United States Circuit Judge.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit.

IN EQUITY—No. 3706.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

S. F. RUTTER, as Prohibition Director in and for  
the District of California,

Appellee.

**Assignment of Errors on Appeal to U. S. Supreme  
Court.**

Waldemar Gnerich and Jeremiah T. Regan, appellants in the above-entitled cause, in connection with their petition for appeal herein present and file therewith the following assignment of errors as to which matters and things they say that the decree entered herein on the 9th day of January, 1922, is erroneous, to wit:

FIRST: In refusing to enter a decree reversing the judgment and decree of the District Court dismissing the bill of complaint on the ground that said bill did not constitute a cause in equity under the constitution and laws of the United States.

**SECOND:** In affirming the decree of the District Court granting the motion of the appellee to dismiss complainants' bill of complaint on the ground that the facts alleged in the bill of complaint are insufficient to state a cause of action in equity.

**THIRD:** In holding and deciding that said Circuit Court of Appeals had no jurisdiction over the subject matter of said cause to grant the relief prayed for therein for the reason that the Commissioner of Internal Revenue was not a party to the suit.

**FOURTH:** In holding and deciding that the Commissioner of Internal Revenue is a necessary party in a suit whose purpose is to restrain the enforcement by appellee, as Prohibition Director, of a ruling of the National Prohibition Commissioner which is contrary to, and violative of, the regulations published by said Commissioner of Internal Revenue.

**FIFTH:** In holding and deciding that said Circuit Court of Appeals was precluded from deciding or considering the merits of the cause by the fact that the appellee ceased to be such Acting Prohibition Director during the pendency of the suit.

**SIXTH:** In failing to hold and decide that the appellee did not exceed the power conferred upon him by law and did not act without his powers as such Prohibition Director in enforcing against appellants a ruling of the Prohibition Commissioner contained in the permit of appellants to purchase,



use and dispense "intoxicating liquors" as said term is defined in the National Prohibition Act, that appellants could not purchase, use and dispense more than 100 gallons of "intoxicating liquors" for medicinal purposes in filling lawfully issued prescriptions and in compounding medicinal preparations, during any quarter.

SEVENTH: In failing to hold and decide that the said purported limitation or ruling of said Prohibition Commissioner on the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which appellants could purchase, use and dispense for strictly medicinal purposes in their business as pharmacists, as set forth in said permit, was not null and void and of no force and effect and beyond the power and without the jurisdiction of "Prohibition Commissioner" at Washington to make and beyond the power and without the jurisdiction of the appellee Prohibition Director to enforce.

EIGHTH: In failing to hold and determine that the "Prohibition Commissioner" had no power to make and appellee no power to enforce any limitation upon appellants' right to use and dispense alcohol and other "intoxicating liquors" for medicinal purposes other than such limitations thereon as are enumerated in the National Prohibition Act itself or contained in the regulations made and published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States.

NINTH: In failing to hold and determine that the "Prohibition Commissioner" has no power to make and appellee no power to enforce any limitation or restriction upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, that can be used and dispensed by appellants for other than beverage purposes other than or different from such limitations or restrictions as are expressed in the Eighteenth Amendment to the Constitution of the United States, in the National Prohibition Act itself, or in the rules and regulations duly published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States under the authority of said Act.

TENTH: In failing to hold and determine that the appellee as Acting Prohibition Director of the State of California had no authority to enforce a limitation upon the amount of "intoxicating liquor," as that term is defined in the National Prohibition Act, which could be purchased, used and dispensed by the appellants for medicinal purposes in their business as pharmacists other than or different from the limitation fixed and determined by the amount of the bond furnished by appellants under the provisions of Paragraph A, Section 60 of "Regulations 60, relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under article 2 of the National Prohibition Act of October

28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

**ELEVENTH:** In refusing to enjoin appellee from continuously and irreparably injuring appellants' business by enforcing the limitation and restriction placed in the permit of appellants to dispense "intoxicating liquor" for medicinal purposes and from acting without authority of law and in violation of the rights of appellants to purchase, use and dispense in their business as pharmacists such amounts of alcohol and other "intoxicating liquor" as that term is defined in the National Prohibition Act "as is necessary to the business needs" of the appellants, as authorized by subdivision A, Section 56 of "Regulations 60 relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession and use of intoxicating liquor under Article 2, of the National Prohibition Act of October 28, 1919, providing for the enforcement of the Eighteenth Amendment of the Constitution of the United States."

**TWELFTH:** In failing to hold and determine that any rule or regulation of the treasury department published under the authority of the National Prohibition Act or any rule made by the National Prohibition Commissioner or any provision of said National Prohibition Act which has not the purpose and effect of "regulating" the use of "intoxicating liquors" for medicinal purposes but on the contrary has the purpose and effect of "prohibiting" such use is null and void and contrary to the provisions of

the Ninth and Tenth Amendments to the Constitution of the United States.

WHEREFORE said appellants pray that said decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed and that appellants be granted the relief prayed for in their bill of complaint and such other and further relief as may be appropriate.

HARRY G. McKANNAY,  
Attorney for Appellants.

[Endorsed]: Assignment of Errors on Appeal to Supreme Court U. S. Filed May 17, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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Premium charged for this bond is \$10.00 per annum.

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY,  
Baltimore, Maryland.

No. 30755-22. \$500.00.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,

Appellants,

vs.

E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Appellee.

**Bond on Appeal to U. S. Supreme Court.**

**KNOW ALL MEN BY THESE PRESENTS:**

That the United States Fidelity and Guaranty Company, of Baltimore, Maryland, is held and firmly bound unto the respondent in the above-entitled action in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said respondent, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, he binds himself, his successors and assigns, firmly by these presents.

Sealed with its seal and dated this 8th day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WHEREAS, the appellants in the above-entitled action have prosecuted an appeal in said action, to the Supreme Court of the United States, to reverse the decree rendered and entered in said action, on the 9th day of January, 1922, in the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, the condition of the above obligation is such, that if the said appellants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

**UNITED STATES FIDELITY AND  
GUARANTY COMPANY,**

[Seal]

By HENRY V. D. JOHNS,

By ERNEST W. SWINGLEY,

Attorneys-in-fact.

78 *Waldemar Gnerich and Jeremiah T. Regan*

Approved this 17th day of May, 1922.

W. H. HUNT,  
United States Circuit Judge.

[Endorsed]: Bond on Appeal to Supreme Court  
U. S. Filed May 17, 1922. F. D. Monekton, Clerk.  
By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

IN EQUITY—No. 3706.

**WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,**

**Appellants,**

**vs.**

**S. F. RUTTER, as Prohibition Director in and for  
the District of California,**

**Appellee.**

**Citation on Appeal to U. S. Supreme Court.**

The President of the United States of America,  
To S. F. RUTTER, as Prohibition Director in  
and for the District of California.

You are hereby cited and admonished to be and  
appear at the Supreme Court of the United States,  
at the City of Washington, in the District of Colum-  
bia, within sixty (60) days after the date of this  
citation, pursuant to an appeal allowed and filed in  
the Clerk's office of the United States Circuit Court  
of Appeals for the Ninth Circuit, in the above-en-  
titled cause, wherein Waldemar Gnerich and Jere-  
miah T. Regan are appellants and you are appellee,  
to show cause, if any there be, why the decree rend-  
ered against the said appellants, as in said appeal  
mentioned, should not be corrected, and why speedy  
justice should not be done the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT,  
Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit, this 17th day of May, 1922.

W. H. HUNT,  
Judge, United States Circuit Court of Appeals,  
Ninth Circuit.

Service by copy of the within citation on appeal  
is hereby admitted this 18th day of May, 1922.

JOHN T. WILLIAMS,  
Attorney for Appellee.

[Endorsed]: Citation on Appeal to Supreme  
Court U. S. Filed May 18, 1922. F. D. Monckton,  
Clerk. By Paul P. O'Brien, Deputy Clerk.



United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 3706.

**WALDEMAR GNERICH and JEREMIAH T.  
REGAN, Copartners Doing Business Under  
the Firm Name and Style of B. & S. DRUG  
COMPANY,**

Appellants,

vs.

**E. C. YELLOWLEY, as Acting Prohibition Direc-  
tor in and for the District of California,  
Appellee.**

**Certificate of Clerk U. S. Circuit Court of Appeals  
to Transcript of Record upon Appeal to the  
Supreme Court of the United States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty (80) pages, numbered from and including 1 to and including 80, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of May, A. D. 1922.

[Seal]

F. D. MONCKTON,

Clerk.

By Paul P. O'Brien,

Deputy Clerk.

Endorsed on cover: File No. 29,033. U. S. Circuit Court Appeals, 9th Circuit. Term No. 483. Waldemar Gnerich and Jeremiah T. Regan, co-partners, doing business under the firm name and style of B. & S. Drug Company, appellants, vs. S. F. Rutter, as prohibition director in and for the district of California. Filed July 14th, 1922. File No. 29,033.

